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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SYLVIA LOSTAL, HYMAN and LORRAINE SPIERS, BERENICE ROSENBERG and HELEN GALIPIDI,
Plaintiffs-Petitioners,

—against—

MANVILLE CORPORATION, JOHNS-MANVILLE CORPORATION, JOHNS-MANVILLE SALES CORPORATION, JOHNS-MANVILLE PRODUCTS CORPORATION, UNARCO INDUSTRIES, INC., formerly known as UNION ASBESTOS & RUBBER CO., EAGLE PICHER INDUSTRIES, INC., SOUTHERN TEXTILE CORPORATION, formerly known as SOUTHERN ASBESTOS CORPORATION, H. K. PORTER COMPANY, INC. RAYBESTOS-MANHATTAN, INC., OWENS-ILLINOIS CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, KEENE CORPORATION, CELOTEX CORPORATION, G.A.F. CORPORATION and NICOLET INDUSTRIES, INC.,
Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Does the admiralty and maritime jurisdiction of the district courts extend to product liability claims asserted by workers injured by exposure to asbestos while engaged in the traditional maritime activities of construction and repair of vessels in navigable waters?

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SLYVIA LOSTAL, HYMAN and LORRAINE SPIERS, BERENICE ROSENBERG and HELEN GALIPIDI,

Plaintiffs-Petitioners,

—against—

MANVILLE CORPORATION, JOHNS-MANVILLE CORPORATION, JOHNS MANVILLE SALES CORPORATION, JOHNS-MANVILLE PRODUCTS CORPORATION, UNARCO INDUSTRIES, INC., formerly known as UNION ASBESTOS & RUBBER CO., EAGLE PICHER INDUSTRIES, INC., SOUTHERN TEXTILE CORPORATION, formerly known as SOUTHERN ASBESTOS CORPORATION, H. K. PORTER COMPANY, INC., RAYBESTOS-MANHATTAN, INC., OWENS-ILLINOIS CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, KEENE CORPORATION, CELOTEX CORPORATION, G.A.F. CORPORATION and NICOLET INDUSTRIES, INC.,

Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners Sylvia Lostal, Hymen and Lorraine Spiers, Bernice Rosenberg and Helen Galiardi seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered October 5, 1984, holding that the Admiralty Jurisdiction of the United States does not extend to claims of shipyard workers for injury and death resulting from exposure to asbestos while on navigable waters.

Opinions Below

The opinion of the Court of Appeals is unreported and appears at pages 1a to 4a of the Appendix. The opinion of the District Court is unreported and appears in relevant portions at pages 5a to 12a of the Appendix.

Jurisdiction

The judgment of the Court of Apeals was entered on October 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statement of the Case

These actions were commenced on behalf of individuals who, while engaged in the historic maritime activity of construction and repair of vessels, were exposed to asbestos-containing materials, contracted asbestos-related disease and in some instances died. Although construction and repair of vessels in and upon navigable waters has historically been deemed by this Court to be an activity over which admiralty jurisdiction lies, the Court of Appeals nonethelesss dismissed the actions for want of admiralty jurisdic-

tion under 28 U.S.C. §1331(1). As will be developed below, the ruling of the Court of Appeals conflicts with a recent decision of this Court, which confirmed that admiralty principles continue to govern situations involving injury to workers engaged in maritime construction—a historic maritime activity. Then too, the conclusion of the Court of Appeals is in conflict with the express ruling of the Fourth Circuit upholding admiralty jurisdiction over claims exactly akin to those involved here.

In short, review by certiorari is necessitated by both the existence of a conflict among the circuits, and a conflict between the ruling of the Court of Appeals and the guiding decisions of this Court.

REASONS FOR GRANTING THE WRIT

POINT I

The ruling of the Court of Appeals is in conflict with the decisions and analysis of this Court.

a. Claims for injury sustained during construction and repair of vessels have historically been cognizable in admiralty.

For many years, it was often said that the existence of admiralty jurisdiction over tort actions turned solely upon whether the injury occurred upon navigable waters. The "general doctrine that . . . admiralty jurisdiction depends . . . in tort matters upon the locality has been so frequently asserted by this Court that it must now be treated as settled." *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469, 476 (1922); *The Plymouth,* U.S. (3 Wall.) 20, 33 (1866). Simply put, if the injury occurred on navigable waters, admiralty jurisdiction existed.

Yet, there is some question whether this Court ever squarely held "that a maritime locality is the sole test of admiralty tort jurisdiction." *Executive Jet Aviation, Inc.* v. *Cleveland,* 469 U.S. 249, 258 (1972). As some authorities have pointed out, even the age-old cases upholding "admiralty jurisdiction exacted a showing of something more [than mere locality], a maritime connection of some sort. . . ." *Hubschman* v. *Antilles Airboats, Inc.,* 440 F. Supp. 828, 836 (D.V.I. 1977); *see* Comment, *Admiralty Jurisdiction Airplanes and Wrongful Death in Territorial Waters,* 64 Colum. L. Rev. 1084.

It is particularly significant, then, that claims for injuries arising from the construction and repair of vessels in navigable waters have, from the earliest days, been held to be within the admiralty jurisdiction. As to ship construction, this Court long ago settled the question "whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state;" "we answer, yes." *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469, 477-478 (1922). In a similar fashion, the Court has repeatedly held that a tort "suffered by one doing repair work on board a completed vessel" is "maritime" in nature and has a "direct relation to navigation and commerce." *Robins Dry Dock & Repair Co.* v. *Dahl,* 266 U.S. 449, 457 (1925); *accord, e.g., Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U.S. 479, 481 (1923).

To the extent that the test for admiralty jurisdiction always required some nexus with traditional maritime activity, these early cases establish that construction and repair of vessels qualifies as such an activity. More important is the explicit recognition in the decisions of the traditional existence of admiralty jurisdiction over injuries incurred in the course of construction and repair of ships.

Without any question, therefore, the claims interposed by petitioners in these actions—relating to injuries received while constructing and repairing vessels—are historically within admiralty jurisdiction. And, the 1972 decision in *Executive Jet* does not and was not intended to suddenly divest admiralty courts of this historic jurisdiction. To the contrary, historic maritime matters remain maritime in nature, as this Court has confirmed in its recent decisions in the area.

b. The Court has confirmed that historic maritime matters remain maritime matters.

Only recently, this Court addressed an issue closely akin to that involved here, and ruled that modern decisions in the maritime area do not divest an historic maritime activity of its maritime flavor. In that case, *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates,* 459 U.S. 297 (1983) (hereinafter *Perini North*), an employee involved in building a sewage treatment plant was injured while working on a cargo barge in the Harlem River.

Traditionally and historically, there would have been no doubt that the employee, as a maritime construction worker injured upon navigable waters, would have been covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq.* Like admiralty jurisdiction generally, the test for LHWCA application turned upon whether the locale or situs of the injury was upon navigable waters. *Id.* In 1972, however, Congress added a "status" element requiring some connection between the employment and navigation and commerce for LHWCA coverage to attach. *See Northeast*

Marine Terminal Co. v. *Caputo,* 432 U.S. 249, 264-265 (1977). That status element is virtually identical to the general maritime jurisdiction requirement, also formulated in 1972 in *Executive Jet,* of a "significant relationship to traditional maritime activity." *Executive Jet,* 409 U.S. at 273.

Applying that new status requirement in *Perini North,* the Second Circuit had originally found the LHWCA inapplicable to the worker, even though he would have been traditionally covered under the Act, because of an alleged lack of a nexus between his job and navigation and commerce. Notably, the reasoning of Second Circuit in *Perini North* is identical to its ruling here that workers engaged in shipbuilding and repair lack a connection to traditional maritime activity. It is significant, then, that after granting certiorari in *Perini North,* this Court reversed the judgment of the Second Circuit.

In the course of its opinion, the Court made two points of especial significance. First, the Court held that the "status" element did not and was not designed to remove from the ambit of the LHWCA activities and individuals to which the statute traditionally applied. Instead, the "status" test was meant to limit the expansion of coverage into new and non-traditional areas. 459 U.S. 297, 74 L.Ed. 2d at 482 & n.29.

Second, and even more important, the Court drew a parallel to general admiralty jurisdiction and the *Executive Jet* status test. And, the Court indicated that the *Executive Jet* "status" element was formulated to serve a narrow purpose, limiting the expansion of general admiralty jurisdiction in cases where it was wholly fortuitous that the injury occurred on navigable waters: "The explicit language of *Executive Jet* makes it clear that our discussion was occasioned by 'the problems inherent in

applying a locality-alone test of admiralty tort jurisdiction' . . . in a situation where 'the fact that an aircraft happens to fall in navigable waters, rather than on land, *is wholly fortuitous.*'" 459 U.S. 297, 74 L.Ed. 2d at 481-485 & n. 29. Of course, the employee in *Perini North,* "was by no means 'fortuitously' on the water when he was injured" and therefore the status test of *Executive Jet* was inapplicable. *Id.*

In rather clear-cut, straight-forward language, the Court thus has indicated that the "status" or "nexus" requirement of *Executive Jet* did not divest admiralty courts of jurisdiction over claims which would traditionally be heard in admiralty. Indeed, even prior to *Perini North,* a numberp of courts had recognized that *Executive Jet* did not overturn historic, existing admiralty jurisdiction. See, *e.g., Kelly* v. *United States,* 531 F.2d 1144, 1146-1147 (2d Cir. 1976); *Earles* v. *Union Bourge Line Corp.,* 486 F.2d 1097, 1100-1101 (3d Cir. 1973); *Hubschman* v. *Antilles Airboats, Inc.,* 440 F. Supp. 828, 840-841. Since there is no question but that claims of injury stemming from construction or repair of a ship in navigable waters are historically within the admiralty jurisdiction, that historic jurisdiction was not uprooted by *Executive Jet.*

c. Application of the status test confirms the propriety of exercising admiralty jurisdiction.

It is a fundamental tenet of admiralty law that where an injury occurs on navigable waters, admiralty jurisdiction is not displaced merely because the negligence or wrongful conduct originated or took place on land. *E.g., Kelly* v. *United States,* 531 F.2d 1144, 1146 (2d Cir. 1976); *Jig The Third Corp.* v. *Puritan Marine Insurance Underwriters Corp.,* 519 F.2d 171 (5th Cir. 1975). And, as the

circuits have generally recognized, "*Executive Jet* did not reject that traditional rule . . ." *Kelly* v. *United States,* 531 F.2d at 1146. Indeed, were the rule otherwise, there could be no assertion of product liability claims in admiralty, which could be contrary to the plethora of authority upholding such claims. *E.g., Pan-Alaska Fisheries, Inc.* v. *Maritime Construction & Design Co.,* 565 F.2d 1129 (9th Cir. 1977); *Sperry-Rand Corp.* v. *Radio Corp. of America,* 618 F.2d 319 (5th Cir. 1980); *Lindsay* v. *McDonnell-Douglas Aircraft Corp.,* 460 F.2d 631 (8th Cir. 1972); *White* v. *Johns-Manville Corp.,* 662 F.2d 234, 239 (4th Cir. 1981) *cert. denied,* 454 U.S. 1163 (1982).

It follows, therefore, that in assessing whether a particular situation bears a significant relationship to traditional maritime activity, the focus must be upon the activity of the injured party and not upon the land-based conduct of the manufacturer. Simply stated, "the 'activity' whose relationship to traditional maritime [is] to be examined [is] that of the injured party, not that of the tortfeasor." *Union Oil Co.* v. *Oppen,* 501 F.2d 558, 561 (9th Cir. 1974); *accord, e.g., Sperry-Rand Corp* v. *Radio Corp. of America,* 618 F.2d 319, 321 (5th Cir. 1980); *Jig The Third Corp.* v. *Puritan Marine Insurance Underwriters Corp.,* 519 F.2d 171 (5th Cir. 1975); *Hubschman* v. *Antilles Airboats, Inc.,* 440 F.Supp. at 841. And, as previously demonstrated, there is no doubt that the activity of workers in constructing, repairing and overhauling ships was historically within the ambit of admiralty jurisdiction. That alone would be sufficient to satisfy the "status" test.

Although such workers may not be entitled to the maritime warranty of seaworthiness, or to the remedy of maintenance and cure, that does not prevent their activities from falling within historic maritime jurisdiction. Demonstrating that admiralty jurisdiction is not confined to those

entitled to such remedies is a recent decision of this Court upholding maritime jurisdiction over claims made by individuals engaged in pleasure boat activities—individuals who without question were not entitled to any warranty of seaworthiness or maintenance and cure. *Foremost Insurance Co.* v. *Richardson,* 457 U.S. 668 (1982).

There are yet other connections between the installation of asbestos materials into ships and traditional maritime activity. In the first place, the asbestos products to which the workers were exposed either previously had been or were in the process of being incorporated into the ship itself. Quite literally, therefore, the injury causing substance was or became an appurtenance to the ship. *Cf. Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 (1971) (no admiralty jurisdiction for a land-based injury because the injury causing material was not an appurtenance to nor stored on board the ship). And, although asbestos did not have an exclusive maritime application, the products used in shipyards "were designed, advertised and marketed [specifically] as maritime asbestos products." *White* v. *Johns-Manville Corp.,* 662 F.2d at 240. In short, the products had and were designed to have particular application for maritime use and were in fact widely used in the maritime industry.

That the material was an essential part of the ship is manifest; without insulation, and without the shipyard workers, there could have been no maritime industry. Finally, insofar as petitioners are concerned, the product was utilized, and petitioners were exposed to it, upon navigable waters. These facts, coupled with the historic existence of admiralty jurisdiction over injuries to maritime construction workers, makes out not just a significant but a compelling nexus to traditional maritime activity.

Even if the status test is rigorously applied, therefore, the connection to traditional maritime activity is beyond question.

* * *

In view of this Court's recent pronouncements that the status test in admiralty was not designed to upset traditional maritime jurisdiction, and the historic maritime flavor of the petitioners' claims, there is a plain conflict between the ruling of the Court of Appeals and the decisions of this Court. Certiorari should therefore be granted to resolve the conflict and settle the law in this area.

POINT II

There is a conflict among the circuits and the ruling in *White* v. *Johns-Manville* upholding admiralty jurisdiction in a similar situation is in harmony with this Court's analysis.

As the Second Circuit acknowledged, its decision is squarely in conflict with the Fourth Circuit ruling in *White* v. *Johns-Manville Corporation,* 622 F.2d 234 (4th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982) sustaining admiralty jurisdiction over asbestos claims arising out of construction and repair of vessels upon navigable waters. The *White* Court perhaps anticipated, and surely rendered a decision wholly consistent with, the later opinion in *Perini North.* On the other hand, the principal cases which suggest or hold that admiralty jurisdiction does not exist were decided without the benefit of *Perini North,* or without any express analysis of the effect of that ruling. *See, e.g., Harville* v. *Johns-Manville Corp.,* 731 F.2d 775 (11th Cir. 1984); *Lowe* v. *Ingalls Shipbuilding,* 723 F.2d 1173 (5th Cir. 1984); *Austin* v. *UNARCO Industries, Inc.,* 705

F.2d 1 (1st Cir.) *cert. dismissed,* 104 S.Ct. 34 (1983); *Owens-Illinois* v. *United States District Court,* 698 F.2d 967 (9th Cir. 1983). Without the *Perini North* decision—which holds that traditional maritime claims are not displaced by the so-called "status" test—the courts were unable to analyze the issues under the appropriate and controlling law.

If for no other reason, then, this Court should grant certiorari to settle the conflict and provide a measure of uniformity throughout the country. In the final analysis, though, it is the ruling of the Fourth Circuit in *White* that is in harmony with the principles announced by the Court.

CONCLUSION

Given the conflict among the circuits, and the divergence between this Court's precedents and the ruling of the Second Circuit, review by certiorari is necessitated to provide a settled, uniform rule of decision.

Respectfully submitted,

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Certificate of Service

Donald I. Marlin, a member of the firm of Kreindler & Kreindler, attorney for plaintiffs-petitioners, and a member of the bar of this Court, certifies that on the 3rd day of January, 1985, copies of the foregoing Petition for a Writ of Certiorari were served by mail upon all parties required to be served, by placing same in the first class service of the United States Post Office:

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APPENDIX

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

(Filed—October 5, 1984)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of October, one thousand nine hundred and eighty-four.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE RALPH K. WINTER,
Circuit Judges,

HONORABLE CHARLES E. WYZANSKI,
District Judge,
sitting by designation.

SLYVIA LOSTAL, individually, and as Special Administratrix of the Estate of CANDIDO LOSTAL, *et al.*,

Plaintiffs-Appellants,

—against—

MANVILLE CORPORATION, JOHNS-MANVILLE CORPORATION, JOHNS MANVILLE SALES COR-

Judgment of Affirmance of the United States Court of Appeals

PORATION, JOHNS-MANVILLE PRODUCTS CORPORATION, UNARCO INDUSTRIES, INC., formerly known as UNION ASBESTOS & RUBBER CO., EAGLE PICHER INDUSTRIES, INC., SOUTHERN TEXTILE CORPORATION, formerly known as SOUTHERN ASBESTOS CORPORATION, H. K. POTTER COMPANY, INC., RAYBESTOS-MANHATTAN, INC., OWENS-ILLINOIS CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, KEENE CORPORATION, CELOTEX CORPORATION, G.A.F. CORPORATION and NICOLET INDUSTRIES, INC., *et al.*,

Defendants-Appelles.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Judgment of Affirmance of the United States Court of Appeals

1. Appellant shipyard workers claim the district court improperly dismissed their complaint, predicated on 28 U.S.C. § 1333(1), for lack of subject matter jurisdiction. Section 1333(1) provides the federal district courts with jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction." Admiralty jurisdiction in tort exists where the wrong (1) took place on navigable waters ("situs") and (2) "bear[s] a significant relationship to traditional maritime activity" ("status"). *See Executive Jet Aviation, Inc.* v. *City of Cleevland,* 409 U.S. 249 (1972); *Keene Corp.* v. *Uinted States,* 700 F.2d 836 (2d Cir.), *cert. denied,* 104 S.Ct. 195 (1983). In determining whether there exists a significant relationship to traditional maritime activity, courts must consider the functions and roles of the parties, the types of vehicles and instrumentalities involved, and the causation and type of injury. *See Keene Corp., supra,* 700 F. 2d at 844; *Harville* v. *Johns-Manville Products Corp.,* 731 F.2d 775, 784-86 (11th Cir. 1984); *Austin* v. *Unarco Industries, Inc.,* 705 F.2d 1, 13-14 (1st Cir.), *petition for cert. dismissed,* 104 S.Ct. 34 (1983); *Owens-Illinois, Inc.* v. *United States District Court for the Western District of Washington at Tacoma,* 698 F.2d 967, 970-71 (9th Cir. 1983). The shipyard workers did not engage in inherently maritime occupations, but rather were doing jobs of landsmen (Welders, machinists); the instrumentalities central to their claims—asbestos-containing products and the lack of safety equipment—do not possess maritime attributes; and the causation and types of their injuries are indistinguishable from the same injuries occurring in landbased settings. This Court

has expressly held that injuries cauesd by exposure to asbestos fibers, regardless of where that exposure occurs, do not bear a significant relationship to traditional maritime activity and, therefore, are not cognizable under Section 1333(1). *See Keene Corp., supra,* 700 F.2d at 844-45. The shipyard workers' contention that *White* v. *Johns-Manville Corp.,* 662 F.2d 243 (4th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982), is dispositive of their claims is unavailing, since the reasoning of that case has explicitly been rejected by this Court. *See Keene Corp., supra,* 700 F.2d at 844-45. Similarly, the shipyard workers' reliance on *Director, Office Workers' Compensation Programs* v. *Perini North River Assoc.,* 459 P.S. 297 (1983) is misplaced. That case addressed jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, which extends jurisdiction to all "persons engaged in maritime employment." Jurisdiction pursuant to Section 1333(1) is limited to "wrongs [that] bear a significant relationship to traditional maritime activity." Therefore, the district court's dismissal of the shipyard workers' complaint, pursuant to Fed. R. Civ. P. 12(b)(1), for failure to establish a significant relationship between the alleged tortious wrong and traditional maritime activity was proper.

2. Accordingly, the judgments of the district court are affirmed.

IRVING R. KAUFMAN

RALPH K. WINTER

Circuit Judges,

CHARLES E. WYZANSKI

District Judge.

Relevant Portions of the Memorandum Decision and Order of the United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Master File No. MF-1

IN RE EASTERN DISTRICT OF NEW YORK ABESTOS LITIGATION

THIS DOCUMENT RELATES TO:

All Cases

SIFTON, District Judge.

These consolidated actions[1] were commenced by plaintiffs, who allege, *inter alia,* that they or their decedents were Brooklyn Naval Shipyard workers engaged in various occupations relating to the construction and repair of ships who were exposed to asbestos-containing products in the course of their employment and who contracted as-

[1] By order of the Chief Judge of this court, all of the asbestos-related actions in this district were consolidated for administrative purposes and assigned to the undersigned. There are presently pending before this Court twenty-nine asbestos-related actions.

bestos-related diseases as a result of the exposure. Defendants are alleged to be, *inter alia,* manufacturers, producers, suppliers, and distributors of the asbestos-containing products to which plaintiffs or their decedents were exposed.

The matter is before the Court on a motion by the defendants for an order pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the complaints in these consolidated actions for lack of subject matter jurisdiction, except in those actions where jurisdiction is based upon diversity of citizenship and, as to those, striking all allegations of subject matter jurisdiction other than diversity.[2] In addition, defendants move for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure

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[2] Motions to dismiss the complaint have been filed by two separate groups of defendants. Defendants GAF Corporation, Celotex Corporation, Fiberboard Corporation, H.K. Porter Company, Inc., Owens-Corning Fiberglass Corp., and other defendants joining this group filed the motion referred to in the text. Defendants Pittsburgh Corning Corporation, Keene Corporation, Keene Building Products Corporation and defendants joining this group have filed a separate motion to dismiss the complaints for lack of subject matter jurisdiction or, alternatively, to have this Court certify for appeal, pursuant to 28 U.S.C. §1292(b) the issue of whether these cases lie within this Court's admiralty jurisdiction. This second group of defendants takes the position that the sole jurisdictional basis for plaintiffs' claims is admiralty jurisdiction. *See* Brief in Support of Motion to Dismiss, Feb. 25, 1983, at p. 1. However, as will be discussed in more detail in the text, several plaintiffs have alleged bases of subject matter jurisdiction other than admiralty. At the same time, those plaintiffs alleging alternative bases of jurisdiction have not joined issue on these alternative jurisdictional grounds.

granting summary judgment in four actions[3] on the ground of *res judicata.*

MOTIONS TO DISMISS FOR LACK OF JURISDICTION

Plaintiffs allege jurisdiction based, *inter alia,* on 28 U.S.C. §1333(1) which provides that the federal district courts have original and exclusive jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction."

The test for determining admiralty jurisdiction in tort, as set forth by the Supreme Court in *Executive Jet Aviation Corp.* v. *City of Cleveland,* 409 U.S. 249, 254-61 (1972), requires that the wrong (1) take place on navigable waters ("situs") and (2) "bear[s] a significant relationship to traditional maritime activity" ("status").

For purposes of the instant motion only, defendants assume, without conceding the point, that each plaintiff can satisfy the locality rule of "status" requirement of the *Executive Jet* test. The only issue with respect to plaintiffs' claim of admiralty jurisdiction, therefore, is whether the wrong alleged bears a significant relationship to traditional maritime activity.

The parties agree that the issue whether plaintiffs' claims of injury sustained during construction and repair of vessels in or upon navigable waters are within this Court's admiralty jurisdiction turns on the scope of the Second

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[3] The actions are *Rosenberg* v. *Johns-Manville Products Sales Corp. et al.* (CV-81-3941); *Galiardi* v. *Manville Corp. et al.* (CV-82-0804); *Galiardi* v. *Fiberboard Corp et al.* (CV-82-3440); *Leventhal* v. *Johns-Manville Products Corp. et al.* (CV-82-1486).

Circuit's recent decision in *Keene Corp.* v. *United States*, 700 F.2d 836 (2d Cir. 1983) (*"Keene"*).

Keene involved a suit for indemnity and contribution by an asbestos manufacturer against the United States Government for, *inter alia*, designing and specifying asbestos products and failing to inspect the workplace. In determining that the acts and omissions alleged were not sufficiently related to traditional maritime activity, the Second Circuit made note of two factual elements not present in the instant case:

> "First, *Keene* does not allege that its insulation was designed for maritime use. . . . Second, many of the roles attributed to the government and allegedly giving rise to Keene's cause of action—the government's sale of asbestos to Keene, its specification of asbestos as a component of insulation it purchased from Keene, its alleged breach of its duty to inspect the work place, its obligations as a promulgator of health regulations—do not bear a significant relationship to traditional maritime activities such as 'navigation and commerce.'"

Keene, supra at 844.

As plaintiffs note, there is a difference between the government's role as alleged in *Keene* as a product designer and suppplier of raw asbestos and the defendants' role in the instant actions as manufacturers and suppliers of finished asbestos products. Thus, plaintiffs argue that, while the raw asbestos supplied by the government might be used as well for non-marine as well as marine purposes, the products supplied by the defendants in the instant actions, although not used exclusively in maritime applica-

tions, were designed for martime use. In response to questioning at oral argument, plaintiffs' counsel stated that proof would be put before a finder of fact to establish that the defendants had designed, advertised, and marketed their products as marine asbestos products. Finally plaintiffs in the instant actions allege that they or their decedents were involved with the marine application of these products in the course of ship construction and repair in shipyards and aboard vessels and, in at least one instance, while at sea.[4]

This sort of proof was held by the court in *White* v. *Johns-Manville Corp.*, 662 F.2d 234, 239 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1037 (1982) ("*White II*), to establish admiralty jurisdiction over injured shipyard workers' claims. Nonetheless, as Judge Blumenfeld noted in a case involving similar asbestso-related claims:

> "In considered dicta in the recent case of [*Keene*], 700 F.2d 836 (2d Cir. 1983), the Second Circuit expressly declined to follow the reasoning in *White II* that shipyard worker claims implicate traditional concepts of maritime law or other reasoning in other situations in cases cited there finding admiralty jurisdiction. 700 F.2d at 844-45. I am not inclined to disregard such emphatically expressed views that admiralty jurisdiction does not exist in the context of these claims. In addition, the decision to deny admiralty jurisdiction is well buttressed by a very thorough and scholarly opinion by Judge Coffin in

[4] Plaintiff Cullen (78 C 2237) alleges that her decedent was exposed to asbestos products while at sea. Complaint ¶17 and 18; Oral Argument, June 2, 1983.

> the First Circuit in *Austin* v. *Unarco Industries,* No. 82-1168 (1st Cir. March 30, 1983), although its method of analysis differs somewhat from that in *Keene.*"[5]

In re General Dynamics Asbestos Cases, No. CML No. 1 and *Morency* v. *Raybestos-Manhattan, Inc., et al.,* Civil No. M-82-491 (D. Conn. April 22, 1983).

For the reasons attributed to by Judge Blumenfeld, I conclude that asbestos-caused injuries to shipyard workers of the type sought to be proved in these cases are not a traditional concern of admiralty law and, accordingly, that this Court lacks admiralty jurisdiction over plaintiffs' claims.

Various plaintiffs allege, in addition to admiralty jurisdiction, one or more of the followign bases of subject matter jurisdiction: diversity of citizenship (28 U.S.C. §1332); federal question (28 U.S.C. §1331); Longshoremen's and Harbor Workers' Compensation Act ("LHW CA") (33 U.S.C. §§901 *et seq.*); and the Admiralty Juris-

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[5] The *Keene* decision focuses largely on whether there was any maritime flavor to the manufacture or supply of the offending asbestos product and concludes that there was not. However, as the First Circuit notes in *Austin* v. *Unarco Industries, Inc.,* No. 82-1168, slip op. at 18-20 (1st Cir. March 30, 1983), courts have extended admiralty jurisdiction to product liability cases in which manufacturers did not explicitly intend or know that their products would be put to maritime use. *See Sperry Rand* v. *RCA,* 618 F.2d 319 (5th Cir. 1980); *Pan Alaska Fisheries Inc.* v. *Marine Construction & Design Co.,* 565 F.2d 1129 (9th Cir. 1977). The First Circuit's analysis in *Austin* focuses on plaintiff's rather than defendants', activities and concludes that these activities are not the traditional concern of admiralty law.

diction Extension Act ("AJEA") (46 U.S.C. §740). As noted, *supra,* certain defendants have moved to strike these alternative jurisdictional allegations except those alleging diversity of citizenship as lacking any merit. As to those actions in which diversity of citizenship is alleged, defendants state that they propose to make applications for summary judgment dismissing the claims asserted as time-barred.

Plaintiffs have, to date, failed to respond to that portion of defendants' application which seeks to strike the alternative jurisdictional allegations other than diversity, and as a result, issue has not been joined on this aspect of the motions. Accordingly, plaintiffs are directed to show cause in writing within 30 days of the date hereof why the relief requested by defendants with respect to jurisdictional allegations other than diversity should not be granted. Defendants are directed to make motions returnable at the same date seeking summary judgment with regard to plaintiffs' claims based on diversity. Until issue has been joined with respect to these alternative bases for jurisdiction, the matter is not ripe for consideration of whether certification to the Court of Appeals is appropriate. For the reasons stated earlier, that portion of defendants' application which seeks to dismiss claims based on admiralty jurisdiction is granted.

For the reasons stated, defendants' motion to dismiss is granted with respect to jurisdictional allegations based on admiralty jurisdiction, 28 U.S.C. §1333(1) (Rosenberg, Leventhal, and Galiardi New York federal and Texas federal actions) and with respect to jurisdictional claims based on diversity in the Rosenberg and Leventhal actions. Defendants' motion to dismiss is denied with respect to the

allegations of diversity contained in the Texas federal action (CV-82-3440).

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York
October 13, 1983

CHARLES P. SIFTON
United States District Judge